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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 719

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 329–337) is reported at 200 F. 2d 666.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1952 (R. 338–339), and a petition for rehearing was denied on January 19, 1953 (R. 344). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether a motion under 28 U. S. C. 2255 to vacate a sentence for conspiracy to commit

espionage was properly denied without a hearing where:

1. Petitioner contended that his conviction violated the treason clause of the Constitution in that proof of his membership in the Communist Party, and references by the prosecution to treachery, turned the trial into one penalizing his disloyalty rather than his acts in violation of the Espionage Act.

2. Petitioner, who made no request for change of venue or adjournment of the trial, alleged that he was denied a fair trial by virtue of a "communal prejudgment" of his guilt, allegedly inspired, in part both before and during the trial, by the prosecution, particularly by statements allegedly describing him as an atom spy.

3. Petitioner's allegations as to the knowing use of perjured testimony at the trial constituted no more than renewed attacks on the credibility of witnesses.

4. Petitioner alleged that some of the material, the transfer of which was shown to be made in execution of the conspiracy, was arbitrarily classified as secret.

STATEMENT

On April 5, 1951, petitioner was convicted, together with Julius and Ethel Rosenberg (petitioners in No. 687, this Term), of conspiracy to commit espionage, and was thereupon sentenced to a 30-year term of imprisonment (R.

173). The conviction was affirmed, and a petition for rehearing was denied by the Court of Appeals. *United States* v. *Rosenberg,* 195 F. 2d 583 (C. A. 2). A petition for a writ of certiorari was denied by this Court on October 13, 1952, 344 U. S. 838, and a petition for rehearing was denied on November 17, 1952, 344 U. S. 889 (Nos. 111–112).

On November 24, 1952, petitioner filed a motion in the United States District Court for the Southern District of New York, under Section 2255 of the Judicial Code, to set aside the judgment of conviction and sentence on grounds which he summarized for the trial court substantially as follows (R. 173–174):

> a. The processes of the trial court were abused during the pendency of the trial by the deliberate bringing about, by the prosecution, of the indictment and arrest of one William Perl, at a time calculated to produce grossly prejudicial newspaper publicity concerning both the event of the indictment and extra judicial statements relating to it, all of which necessarily had the effect of unduly influencing the jurors sitting in petitioner's cause, the full character of the abuse, however, not having been discovered by or discoverable on behalf of petitioner until many months after his trial.
>
> b. By a constant course of conduct prior to petitioner's trial, the Attorney General, the United States Attorney and their As-

sistants, and the Director of the Federal Bureau of Investigation and his agents, together collectively referred to as the Prosecution, engendered an atmosphere hostile to petitioner and predisposed the community from which the jurors were drawn to the belief that petitioner was an "atom spy" and a "member of the Klaus Fuchs spy ring" although at all times those agencies "must have known that such characterizations were false, had no evidence to support them, produced none at the trial, and were seeking thereby wrongfully to insure petitioner's conviction" (R. 174).

c. Petitioner and his co-defendants were so reviled and maligned and made the subject of such constant and spectacular hostile newspaper and radio publicity through the open and covert feeding of prejudicial material to the press, that it was impossible for them to receive a fair trial before an impartial jury in March of 1951, and as a result, the purported trial was but a legal gesture to register a verdict dictated by popular preconception.

d. Evidence of "treachery and general intent to betray" was offered on the trial of petitioner in the guise of proof of specific intent to furnish secret military information, and hence the conviction was based on an unconstitutional application of the Espionage Act in conflict with the treason clause of the Constitution.

e. The prosecuting authorities knowingly used false testimony to bring about petitioner's conviction.

The facts as to each of these questions are set forth at the appropriate point in the Argument.

The District Court found that the files and records of the case and the papers and exhibits submitted on the motion conclusively showed that the petitioner was entitled to no relief (R. 8–30), and, on December 10, 1952, denied his motion (R. 6).

On appeal to the Court of Appeals for the Second Circuit, the order of dismissal was affirmed (R. 330–339). The present petition seeks to review this judgment.

ARGUMENT

1. Petitioner first contends that his conviction was in violation of the treason clause of the Constitution because on certain occasions during his trial the prosecutor used such words as "traitors" and "treasonable" in referring to petitioner and his codefendants, and because the Government was allowed to prove his membership in the Communist Party and the consequences of such membership. He contends that these circumstances made the charge against him one of "constructive treason" which the history of the Constitution's treason clause shows to be beyond the power of Congress.

The substance of this argument was presented to this Court both on petitioner's petition for certiorari for direct review of his conviction and on his application for rehearing after the denial of his petition, although it was not advanced at any time in the District Court. The argument has not gained strength in repetition.

It is clear, as petitioners concede (Pet. 12, 16), that Congress may make illegal the passage of national secrets with the intent that they will be used to advantage another country, even though the incidental effect of proving such an offense is to show that the accused's attachment to the United States is less than full loyalty. Cf. *Cramer* v. *United States,* 325 U. S. 1, 45. Petitioner was punished for conspiring to do specific acts which Congress had a right to forbid, and not, as in constructive treason, for manifesting general disloyalty through any overt act. Proof of the intent with which he did those forbidden acts was, however, relevant and necessary to proof of the crime, and certainly evidence of petitioner's membership in the Communist Party, and of the demands of such membership, was relevant to establish that intent.

There is no merit in the argument that the prosecutor's references, in the context of this case, so confused and distorted the picture that the jury convicted petitioner, not for the acts with which he was charged, but for general abuse of his American allegiance. As we have pointed out

before (Nos. 111–112, Brief for the United States in Opposition, pp. 25–26), the number of such references, most of which were made in the opening and closing statements of the prosecution, was small. And, in any event, the court's instructions clearly explained the charge against the petitioner and his codefendants (Nos. 111–112, R. 1545–1548, 1550–1554). Although it is additionally contended that the trial judge also used the "traitor" epithet, reference is made only to one place in the record, which in the context of 24 printed pages of instructions, hardly has the significance petitioners attach to it. Petitioner was tried and convicted, not for a disloyal state of mind, but for acts of espionage.

2. Petitioner next complains of what he calls "knowingly false prosecutor-disseminated pretrial characterizations of Sobell as an 'atom spy.'" This is an aspect of a more general complaint by petitioner and his codefendants to the allegedly adverse publicity given to them and their case which is alleged to have had a special impact against petitioner.

The record does not support petitioner's complaint. His moving papers refer to relatively few prosecution statements relating to petitioner. These were in general that Sobell's arrest resulted from the Fuchs-Gold atomic espionage revelations and that Sobell was linked with Rosenberg who in turn had been linked with Fuchs and Gold in atomic espionage (R. 185–190). It did not need

"prosecutor-dissemination" for the newspapers to make the assumption that petitioner was part of an atom spy ring.

But, whatever confusion existed in the newspapers, the jury could not have listened to the evidence or followed its instructions without realizing that the petitioner's physical participation in a theft of atom bomb data was not in the case. Twice during the course of his instructions, the trial judge specifically made the point that the case involved not merely a conspiracy about the atom bomb, but rather a conspiracy to obtain secret information relating to the national defense (R. Nos. 111–112, 1557, 1560). He did this after he had specifically outlined to the jury the Government's case against the petitioner and against his codefendants in such terms that they could not possibly have thought that petitioner had transmitted bomb secrets (R. Nos. 111–112, 1555–1557).

The decision of the Court of Appeals on appeal from petitioner's conviction establishes that it was not improper to try him on an indictment charging a single conspiracy with his codefendants. The fact that the newspapers, for shorthand purposes, may have thought that this made petitioner an atom spy (cf. R. 186) does not support the conclusion that the jury could not have understood the court's instructions respecting the necessary conditions for a verdict of guilty against him. It is one thing to suggest that

jurors may be confused by, and therefore not follow, narrow limiting instructions about the admission of evidence. It is quite another thing to suggest that they cannot understand that the case before them must be decided solely on the basis of evidence presented in court.

Thus, the allegations of "knowingly false prosecutor-disseminated pretrial characterizations * * *" have no serious support in the record, and, in any event, the possible prejudicial effects resulting from newspaper treatment of petitioner as an "atom spy" were effectively neutralized by the trial court.

3. and 4. The remainder of the petition is in substance an incorporation of points made by petitioner's codefendants in their petition for certiorari (No. 687, this Term). For answer, thereto, the Court is respectfully referred to the Brief for the United States in Opposition to that petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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